
(1992) 06 RAJ CK 0010

In the Rajasthan High Court

Case No : Habeas Corpus Petition No. 3367 of 1992

Sunil Longiya

APPELLANT

Vs

Union of India (UOI) and Others

RESPONDENT

Date of Decision : 04-06-1992

Acts Referred:

Conservation of Foreign Exchange and Prevention of Smuggling Activities Act, 1974 — Section 3
Constitution of India, 1950 — Article 166, 226, 32
Customs Act, 1962 — Section 104, 108, 112, 123, 124

Citation : (1992) 1 WLN 366

Hon'ble Judges : M.B. Sharma, J;Farooq Hasan, J

Bench : Division Bench

Final Decision : Allowed

Judgement

M.B. Sharma, J.—In D.B. Habeas Corpus Petition No. 1194/1992 Gyan Chand Jain v. State of Rajasthan and Ors. the detention order dated January 8, 1992 of Sunil Longiya made u/s 3 of the Conservation of Foreign Exchange and Prevention of Smuggling Activities Act, 1974 [for short, the COFEPOSA Act) was challenged. The detenu Sunil Longiya is the son of Gyan Chand Jain, petitioner in this petition. This Court under its order dated April 2, 1992 had upheld the detention order and the Habeas Corpus Petition challenging the detention order of Sunil Longiya was dismissed. The detenu himself has filed this second Habeas Corpus Petition. So far as the maintainability of this petition is concerned the same is no longer res-integra in view of the decision of the Supreme Court in the case of Shri. Lallubhai Jogibhai Patel Vs. Union of India (UOI) and Others, . The Apex Court in para 13 of its judgment said-

The position that emerges from a survey of the above decisions is that the application of the doctrine of constructive res judicata is confined to civil actions and civil proceedings. This principle of public policy is entirely inapplicable to illegal detention and does not bar a subsequent petition for a writ of habeas corpus under Article 32 of the Constitution on fresh grounds, which were not

taken in the earlier petition for the same relief.

Learned Addl. Advocate General has tried to distinguish the aforesaid authority on the ground that it was a petition under Article 32 of the Constitution and not under Article 226 of the Constitution and in that case the fresh grounds which were taken were not even within the knowledge of the detenu. Therefore, learned Additional Advocate General contends that if the grounds are within the knowledge of the detenu of the time when earlier petition was filed, but he does not take them, he cannot be allowed to raise those grounds in the fresh habeas corpus petition. But we have already extracted the ratio of the aforesaid case and there can be no doubt that the principles of constructive res judicata are not attracted to the illegal detention and a fresh petition on fresh grounds which were not taken in the earlier petition for the same relief even though available, can be raised again.

2. Before we proceed further, it will be necessary to give a lacuna of the facts of the case though they are already contained in our earlier order under which we had dismissed the earlier habeas corpus petition. It was on July 17, 1991, at about 8.30 a.m. that Sunil Longiya when he was riding on a Priya Scooter No. RNV-7660 at Sabji Mandi, Janta Bazar, Jaipur, was stopped and on a search of his person being taken in the Customs office, it was found that he was having 25 gold biscuits bearing foreign mark, each of 10 tolas. The said gold biscuits were recovered. On the aforesaid gold biscuits- JOHNSON HATTBEY LONDON 9990 TOLAS" was engraved, Sunil Longiya could furnish no explanation of the same . The total weight of the gold was 250 tolas and the market value of which was Rs. 11,50,000/-. He was arrested on July 18, 1991. His confessional statement u/s 108 of the Customs Act, was recorded and he was produced before the Magistrate on July 18, 1991. The Magistrate in view of certain decision of this Court that he had no power to remand, allowed him to go without there being bail order. He is said to have retracted his confessional statement by making an application before the. Chief Judicial Magistrate [Economic Offences) Jaipur. On July 19, 1991, he filed an application before the Chief Judicial Magistrate alongwith injury report. On November 18, 1991 proposal for detention was received from the Customs Department by the Home Secretary and the case was examined by the Screening Committee on November 20, 1991 and the proposal of the customs authorities was approved. The matter was examined by the Special Secretary Home [Law] on December 3, 1991. Opinion of the Special Secretary [Home) was received and the matter was referred back to the Collector [Customs) on December 6, 1991 regarding delay in sending the proposals. Reply of the Collector (Customs) was received on December 12, 1991 and the matter was again examined by the Special Secretary, Homes, on December 16, 1991. The matter was placed before Home Minister for approval on December 17, 1991 and the approval was made on December 18, 1991. File was received back from the Home Minister on December 19, 1991 and formal detention order was passed on January 8, 1992. The order was served on the detenu on January 9, 1992. The matter was referred to the Central Government

on January 15, 1992. Representation was received from the detenu on January 25, 1992 which was rejected on February 10, 1992 by the State Government. The detenu had requested on February 22, 1992 to the detaining authority for sending his representation to the Central Government, but because it had been rejected on February 10, 1992, as aforesaid, it does not appear to have been sent to the Central Government.

3. It will appear from the earlier order of this Court dated April 2, 1992, that the grounds on which the detention order was challenged were-

(i) the detention order was not in conformity with the provisions of Article 166 of the Constitution of India having not been executed, nor having been expressed to be taken in the name of the Governor;

(ii) there has been delay in passing the detention order;

(iii) the vital documents were not supplied to the detenu,;

(iv) there is total non-application of mind in issuing the detention order by the detaining authority, and

(v) the detenu had requested on February 22, 1992 for sending his representation to the Central Government, but the State Government had not forwarded the same to the Central Government.

It will be seen from the earlier order of this Court dated April 2, 1992 that so far as the last ground is concerned, it has been dealt with by this Court in para 18 of the order. One more ground was also taken in respect of discrimination and it was urged that no order of detention has been made against Ram Singh and Nawal Kishore who were similarly situated persons. This Court repelled all the grounds. As we have already said that the principle of constructive resjudicata is not attracted to the illegal detention and a habeas corpus petition on fresh grounds is maintainable we will proceed to straightaway to the fresh grounds on which the present petition has been filed in challenging the order of detention dated January 8, 1992.

4. The fresh grounds which have been taken in the present petition are-

(a) show cause notice u/s 124 of the Customs Act, 1962 issued by the Additional Collector Jaipur, dated 26/27th December, 1991 (Annr.D), was not placed before the detaining authority, though it is mentioned in the grounds of detention that prosecution and adjudicatory proceedings can be initiated against the petitioner and that the show cause notice was vital and material document and withholding of the same from the detaining authority vitiated the subjective satisfaction of the detaining authority:

(b) Though the detenu was informed that he had a right to make a representation against the detention order to the State Government as well as to the Central Government, and also to Advisory Board (COFEPOSA), but he was given addresses of the State Government, and Advisory Board, but was not

informed the address of the Central Government where he could make his representation and thus he has been deprived of his right to make his representation to the Central Government;

(c) There has been long and undue delay in dismissing the representation of the detenu which was dismissed on February 10, 1992;

(d) Despite the demand in his representation a copy of the order dated July 18, 1991 passed by the Chief Judicial Magistrate (Economic Offences) under which the detenu was ordered to be released by the Customs Officer, was not supplied to the petitioner and thus, he has been deprived of his right to make purposeful and effective representation;

(e) Irrelevant document were considered; and

(f) the order of detention has been made on non-existing grounds as a result of which the detenu was confused and could not make effective representation.

As in our opinion, this Habeas Corpus Petition succeeds on the ground (a), we need only to deal with that ground and therefore, it will not be necessary for us to deal with other grounds set out above on which the detention order has been challenged as aforesaid. It can be said that so far as ground (a) is concerned, it was not taken in the earlier Habeas Corpus Petition. It was contended by the learned Counsel for the detenu that he had received a show cause notice (Annr.D) dated December 27, 1991 issued by the Addl. Collector [Customs] to show cause within the stipulated time as to why the scooter and 25 gold biscuits be not confiscated and should not be forfeited and why a penalty should not be imposed on him u/s 112 of the Customs Act, 1962. He was also called upon to discharge the burden of proof cast upon him u/s 123 of the Customs Act that 25 gold biscuits bearing foreign mark recovered from his possession are not smuggled. Learned Counsel for the petitioner contends that if this show cause notice would have been placed before the detaining authority, and the detaining authority would have applied its mind, it was possible that as a result of this notice, the subjective satisfaction of the detaining authority that it was necessary for the reasons mentioned in Section 3 of the COFEPOSA Act to make the detention order, might not have been there and the detaining authority would not have made the detention order. While giving the facts of this case it has already been stated that the sponsoring authority had already forwarded its proposal for detention on November 18, 1991 to the detaining authority and the case was examined by the Screening Committee on November 20, 1991 and after examining the case by the Special Secretary-Home [Law] and after opinion of the Special Secretary [Home] the matter was referred back to the Collector [Customs] on December 6, 1991 to furnish explanation for the delay in making the proposal. It has already been said that the reply of the Collector [Customs] explaining the delay had been received on December 8, 1991, rather the proposal to make the detention order had been approved even by the Home Minister on December 18, 1991 and the file had been received back from the

Home Minister on December 19, 1991 and the order of detention was no doubt made on January 8, 1992. It will appear that the aforesaid show cause notice (Annr. D) was even issued after the proposal of the Sponsoring Authority to make the order u/s 3 of the COFEPOSA Act, had been approved by the Home Minister. In case of *Ashadevi v. Shivraj and Anr.* AIR 1979 SC 447, the Apex Court referred to the settled position of law that subjective satisfaction is a condition precedent to the passing of the detention order and said that the subjective satisfaction will get vitiated if material or vital facts which would have a bearing on the issue and would influence the mind of the detaining authority one way or the other are ignored or not considered by the detaining authority before issuing the detention order. The facts of that case were different and the court was not considering the case where after the sponsoring authority had initiated the proposal, the case has been finalised at the level of Home Minister and thereafter notice of adjudicating proceeding was given. In *Andrew Simon King Vs. Union of India and Others*, the Delhi High Court said that it is the duty of the concerned authority to collect material and place the relevant material before the detaining authority. It will be seen from the facts of the aforesaid case that the question was the detenu having retracted his confession which was on the record of the court case and many documents had been obtained from the court file by the sponsoring authority. In the aforesaid case a reference was made to the case of *Union of India (UOI) and Others Vs. Manoharlal Narang*, where the question under consideration was an order made by the Apex Court in respect of Ramlal that he will be allowed free movement and the court did not find it necessary to restrict that liberty of Ramlal, but the order was not placed before the detaining authority. It was in that context that the argument referred to in para 9 was dealt with by the Apex Court in para 10 and the Apex Court said-

We are not very happy with the manner in which this important contention has been not in the counter-affidavit. In order of this Court is not an inconsequential matter. It cannot be assumed for a moment that the detaining authority or the sponsoring authority did not know, at the time the detention order was passed, that this Court had refused stay of the Judgment of the Delhi High Court and that Ramlal was allowed freedom of movement subject to certain condition.

The aforesaid case cannot be said to have laid down the law that it is the duty of the detaining authority to collect evidence. In the instant case we have already said that before the notice of adjudication proceedings, the matter had been finalised even by the Home Minister and the detention order was no doubt made on January 8, 1992. Therefore, the aforesaid case is not applicable to the facts of the case. In the case of *Harish Taneja Vs. Union of India and Others*, the detenu was arrested u/s 104 of the Custom Act, 1962. He was produced before the Additional Chief Metropolitan Magistrate on October 5, 1982, and was remanded to judicial custody from time to time and was released on bail on November 10, 1982, On March 23, 1983, a notice was issued to the petitioner in that case by the Assistant Collector of Customs, Bombay asking him to show cause as to why goods and currency seized from him should not be confiscated and action under

the Customs Act be not taken again to him. Therefore with a view to preventing him from smuggling goods and abetting the smuggling of goods the detention order was made. One of the grounds of challenging the detention order which was raised in the Delhi High Court was that the vital fact regarding the issuing of the show cause notice by the Asstt. Collector of Customs which could have influenced the mind of the detaining authority, was not considered by it before the impugned detention order was made and so the subjective satisfaction before issuing the detention order is vitiated. The court in para 11 said that the petition is liable to succeed on the second contention namely that the fact of issuance of show cause notice under the Customs Act has not been considered by the detaining authority. After going through the detention order, the court said that there is no mention of it. The Court further said that there is no doubt that this fact would have a bearing on the issue and could influence the mind of the detaining authority one way or the other, and therefore, the satisfaction leading to the passing of the detention order is thus vitiated. It will appear from the aforesaid case that the detention order was made on March 30, 1983. The notice of adjudication proceeding was given on March 23, 1983. Therefore, no doubt it can be inferred that the notice of adjudication proceedings must have been given and perhaps was given after the sponsoring authority had sent its proposal to the detaining authority for consideration of the case for making the detention order u/s 3[1] of the COFEPOSA Act. It will appear from the grounds of detention that in ground No. 5 it has been stated that the prosecution and adjudication proceedings can be initiated against the detenu but the detaining authority is satisfied that an order should be made against the detenu. There is no mention in the aforesaid ground that the adjudication proceedings have started on the notice dated December 27, 1991 having been issued to the detenu. If it would have been brought to the notice of the detaining authority that the show cause notice of adjudication proceedings under the Customs Act has been given to the detenu and the adjudication proceedings have been initiated and if a copy of the notice would have been given to the detaining authority, in our opinion, it must have affected its subjective satisfaction. In our opinion, before the detention order is made, if any, vital fact or material and document comes into existence, no sooner it comes in existence, it is the duty of the sponsoring authority which has already forwards the proposal to the detaining authority, for consideration whether the detention order should or should not be made, to place the material documents before the detaining authority so that it may consider the same and then despite his consideration of the same, if it still feels, it may make an order u/s 3(1) of the COFEPOSA Act. What was only considered was that prosecution as well as adjudication proceedings can be initiated against the detenu under the Customs Act and not that adjudication proceedings have already been started and show cause notice has been given. We will not go to the extent that it is the duty of the sponsoring authority or for that matter, the detaining authority to collect evidence from different departments. At the same time, if sponsoring authority has come in to possession of any vital fact or document before the detaining authority has actually made the detention order and there is

reasonable gap between the coming into possession of any vital document of fact and the making of the detention order, it is the duty of the sponsoring authority to bring that material fact or document to the notice of the detaining authority as it is likely to affect the subjective satisfaction of the detaining authority. In this case the notice to show cause is dated December 27, 1991, and the order of detention is dated January 8, 1992, no doubt the proposal of the sponsoring authority had been finalised on December 19, 1991, but there was a gap of 12 days, which to our mind was reasonable, in between the finalisation of the case and making of the detention order from December 27, 1991, and under these circumstances, we are of the opinion that a copy of the show cause notice and the fact that the show cause notice of adjudication proceedings under the Customs Act has been issued, should have been brought to the notice of the detaining authority by the sponsoring authority which might have influenced its subjective satisfaction either way which is the condition precedent for making the detention order. Thus, the subjective satisfaction of the detaining authority is vitiated because of with-holding of vital fact and the material document, the notice dated December 27, 1991, from the detaining authority. This ground was not taken in the earlier Habeas Corpus and as such it is a fresh ground and as said earlier, the detention order can be challenged by raising a fresh ground.

5. Consequently, the subjective satisfaction of the detaining authority is vitiated as the sponsoring authority with-held the vital and material document i.e. show cause notice dated December 27, 1991. u/s 3(1) of the COFEPOSA Act, the subjective satisfaction of the detaining authority that with a view to preventing a person from Smuggling goods, abetting the smuggling of goods of engaging in transporting or concealing or keeping smuggled goods, is a condition precedent, which subjective satisfaction as said earlier, in this case, is vitiated.

6. In the result, we allow this Habeas Corpus Petition on the aforesaid ground and hold the continuous detention of the petitioner under the detention order dated January 8, 1992 as illegal. The order of detention of the petitioner dated January 8, 1992 made under Sub-section (1) of Section 3 of the Conservation of Foreign Exchange and Prevention of Smuggling Activities Act, 1947 is quashed and set aside. It is hereby directed that detenu Sunil Longiya shall be released forthwith, if not required in any other case.