
(1993) 10 DEL CK 0044

In the Delhi High Court

Case No : Criminal Writ Petition No. 374 of 1992

Sushil Kumar

APPELLANT

Vs

Union of India and Others

RESPONDENT

Date of Decision : 29-10-1993

Acts Referred:

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

Citation : (1993) 4 AD 545 : (1994) 28 DRJ 93

Hon'ble Judges : Sagar Chand Jain, J

Bench : Single Bench

Advocate : S.K. Dubey, Vikram Dholakia and P.S. Sharma, for the Appellant;

Judgement

S.C. Jain, J.

(1) In this writ petition the detention order bearing No. F.5/28/92-Home (P-II) dated 12.5.92 passed against Mr. Sushil Kumar Bhutani son of Mr. Madan Lal u/s 3(1) read with "Section 2[f] of the Conservation of Foreign Exchange and Prevention of Smuggling Activities Act, 1974 (for short "COFEPOSA") has been challenged at the pre execution stage.

(2) Earlier also a criminal writ petition was filed by this petitioner being Cr.W.P. No. 261 of 1992 - Sushil Kumar vs. Union of India and Others - which was dismissed on 29.6.1992 as withdrawn.

(3) Learned counsel for the petitioner relying upon the decision of the Hon'ble Supreme Court in Additional Secretary to the Government of India and Others Vs. Smt. Alka Subhash Gadia and Another, submitted that the impugned order of detention has been passed for a wrong purpose as there is substantial and unexplained-delay in passing the said order. The order of detention is not sustainable as there is substantial and unexplained delay in execution of the said order. The impugned order of detention has been passed on extraneous and irrelevant grounds and it has been passed against "wrong person."

(4) Learned counsel submitted that the Customs Preventive Officers seized certain cameras and photographic goods from M/s Madan Photo Store situated at 21, Kucha Chaudhary, Chandni Chowk, Delhi which is owned by petitioner's father Mr. Madan Lal and Mr. Sushil Kumar, the present petitioner, has nothing to do with p73 the said business. According to him, the said M/s Madan Photo Store is being looked after by his father, Mr. Madan Lal, and the petitioner has nothing to do with the same. According to the learned counsel, rent receipts of these premises are in the name of Mr. Madan Lal, the petitioner's father. The said shop was challaned under the Shops and Establishments Act and it was Mr. Madan Lal, who was imposed a fine by the Metropolitan Magistrate on 27.7.91 for violation of the provisions of the said Act. The recovery of the alleged smuggled goods from these premises cannot be made the basis for passing the detention order against this petitioner, Mr. SushilKumar, who has nothing to do with the business of the said concern, M/s Madan Photo Store. The detention order has been passed against a wrong person.

(5) The second point raised by the learned counsel for the petitioner is that the premises of M/s Madan Photo Store were searched on 16.2.92 but the impugned detention order was passed on 12.5.92 i.e. after about 3 months and that there is a substantial and unexplained delay in passing the said order. According to him, the order of detention is not sustainable as there is substantial and unexplained delay in execution of the said order and that the impugned order of detention has been passed on extraneous and irrelevant grounds. According to the learned counsel for the petitioner, even the residential address of the petitioner has been wrongly mentioned in the detention order. According to him, as per the ration card the petitioner's address is B-88, Derawal Nagar, Delhi, but the detention order bears the address as AC-610, Shalimar Bagh, Delhi. The detention order was addressed to the petitioner's father's address and not to the petitioner's address. No efforts were made to serve this detention order at the residential address of the petitioner. Moreover, the incident is of 16.2.92 and now we are in October, 1993 and no useful purpose would be served in detaining the petitioner in pursuance of the impugned detention order passed in May, 1992.

(6) MR.P.S.SHARMA, learned Standing Counsel strongly opposed this writ petition and submitted that as the earlier writ petition filed by- this petitioner was dismissed as withdrawn, this second writ petition on the same grounds is not maintainable. He also argued that even assuming that delay in passing the order of detention was not satisfactorily explained, it necessarily does not give rise to an inference that there was no sufficient material for the subjective satisfaction of the detaining authority or that such subjective satisfaction was not genuinely reached. He drew my attention towards the counter affidavit and the additional affidavit filed by Mr. M.U. Siddiqui, Deputy Secretary [Home], Government of the National Capital Territory of Delhi in support of his contention that the detention order was issued at the correct address of the petitioner. In the statements of the father of the petitioner and Mr. Bhupinder Kumar Chhabra, an employee of M/s Madan Photo Store it has come that the address mentioned in the detention

order of the petitioner is the same. It has also been mentioned in these affidavits that this petitioner was dealing with the business of M/s Madan Photo Store from where the alleged smuggled photographic goods were recovered. Though the shop stands in the name of Mr. Madan Lal, petitioner's father, but it has come in the statements of Mr. Madan Lal and Mr. Bhupinder Kumar Chhabra that this petitioner, Mr. Sushil Kumar was dealing with the affairs of this firm, M/s Madan Photo Store.

(7) Learned Standing Counsel submitted that there has not been any delay in passing of the detention order as well as in making efforts for its execution. My attention has been drawn towards various letters produced on the file showing that full efforts were made for effecting the service of detention order on the petitioner. In the additional affidavit filed on behalf of the respondents by Mr. M.U. Siddiqui, Deputy Secretary (Home), Govt of the National Capital Territory of Delhi, it has been mentioned that the detention order was sent for execution to Police Commissioner, Delhi on 12.5.92. A reply was received from Dcp (HQ-II) dated 29.6.92 that sources had been deployed to ascertain the whereabouts of the proposed detenu, Sushil Kumar. On 6.8.92 a D.O. letter was sent to Dcp (HQ) requesting him to serve the detention order. The police party went to AC-610 Shalimar Bagh and B-88 Derawal Nagar, Delhi for execution of the order, but the petitioner was not traceable at both the addresses as intimated by the Dcp (HQ-II) vide letter dated 2.9.92. It is averred that the Dcp (HQ-II) further reported vide letter dated 12.12.92 that Sushil Kumar could not be located at both the addresses mentioned above despite repeated raids. The wife and the mother of the petitioner were found residing at AG-610, Shalimar Bagh, New Delhi. The inmates of House No. B-88, Derawal Nagar, Delhi gave in writing that they did not know Mr. Sushil Kumar Bhutani and no such person was staying in the said premises. According to the learned Standing Counsel, the detaining authority has made sincere efforts to execute the order of detention, but the petitioner has avoided its service by making himself not available and by absconding.

(8) According to the learned Standing Counsel, none of the conditions, as laid down in the case of Additional Secretary to the Government of India vs. Alka Subhash Gadia (supra) are available to the present petitioner.

(9) I have given my thoughtful consideration to the submissions made by the learned counsel for the petitioner and the learned Standing Counsel. I have also perused the record including the file of the respondent containing the order of detention.

(10) The law is now well settled that the Courts can interfere with the detention order even at the pre-execution stage, but the grounds are very much limited in scope and number. As held by Hon'ble Supreme Court in Additional Secretary to the Government of India vs. Alka Subhash Gadia (supra), the grounds under which the Courts can interfere with the detention order at the pre-execution stage are (1) that the impugned order is not passed under the Act under which it is purported to have been passed; (2) that it is sought to be executed against a

wrong person:(3) that it is passed for a wrong purpose; (4) that it is passed on vague, extraneous and irrelevant grounds and (5) that the authority which passed it had no authority to, do so.

(11) In this case, the first ground taken by the learned counsel turn the petitioner that the detention order has been passed against a wrong person is not available. From the statement of Mr. MadanLal, proprietor of M/s Madan Photo Store, the father of the present petitioner, and from the statement of Mr. Bhupinder Kumar Chhabra, who was working as an employee at M/s Madan Photo Store, it is apparent that this petitioner, Mr. Sushil Kumar was managing the affairs of the firm, M/s Madan Photo Store and-he was working there. The statements of both these persons u/s 108 of the Customs Act are very much relevant for the recovery and seizure of the goods of foreign origin from the shop, M/s Madan Photo Store and also that this petitioner, Mr. Sushil Kumar was managing the affairs of that firm. In view of these two statements, i.e. of Mr. Madan Lal and Mr. Bhupinder Kumar Chhabra, it cannot be said that the detention order has been passed against a wrong person. Regarding the second contention that the impugned order was passed after a delay of three months and there is no satisfactory Explanation in this regard, I find from the record that there has not been much delay in passing the detention order. It has been laid down by Hon''ble Supreme Court in T.A. Abdul Rahaman Vs. State of Kerala and others, that no hard and fast rule can be precisely formulated that would be applicable under all circumstances and no exhaustive guidelines can be laid down in that behalf. It follows that the test of proximity is not a rigid or mechanical test by merely counting number of months between the offending acts and the order of detention. However, when there is undue and long delay between the prejudicial activities and the passing of detention order, the Court has to scrutinise whether the detaining authority has satisfactorily examined such a delay and afforded a tenable and reasonable Explanation as to why such a delay has occasioned, when called upon to answer and further the Court has to investigate whether the casual connection has been broken in the circumstances of each case.

(12) In this case, as has been stated above, I do not find any undue and unexplained delay in passing the detention order. This ground is also not available to the petitioner in - the present circumstances of the case.

(13) Regarding the other plea taken by the learned counsel for the petitioner that there has been a considerable delay in service of the detention order and it has vitiated all the proceedings, I do not find any ground for accepting this plea. The detention order was passed on 12.5.92 and immediately the same was sent for execution to the Police Commissioner. Delhi on that date. As is apparent from the additional affidavit filed on behalf of the respondents by Mr. M.U. Siddiqui, Deputy Secretary (Home), Govt of the National Capital Territory of Delhi, which is dated 20.12.92 it has been mentioned that the detention order was sent for execution to Police Commissioner, Delhi on 12.5.92. A reply was received from

Dcp (HQ-II) dated 29.6.92 that sources had been deployed to ascertain the whereabouts of the proposed detenu, Sushil Kumar. On 6.8.92 a D.O. letter was sent to Dcp (HQ) requesting him to serve the detention order. The police party went to AG-610 Shalimar Bagh and B-88 Derawal Nagar, Delhi for execution of the order, but the petitioner was not traceable at both the addresses as intimated by the Dcp (HQ-II) vide letter dated 2.9.92. It is averred that the Dcp (HQ-II) further reported vide letter dated 12.12.92 that Sushil Kumar could not be located at both the addresses mentioned above despite repeated raids. The wife and the mother of the petitioner were found residing at AC-610, Shalimar Bagh, New Delhi.

(14) In the present circumstances of this case, from the record it is apparent that the authorities concerned tried their best to serve the detention order on this petitioner, but he avoided and absconded. A perusal of the record produced by the learned Standing Counsel shows that the impugned detention order has been passed after subjective satisfaction of the detaining authority.

(15) Having regard to the averments made in the counter affidavit and the additional affidavit filed on behalf of the respondents, I am of the view that prima facie it cannot be said that there is a substantial and unexplained delay in passing the detention order and its execution. In the case of Rajendrakumar Natvarlal Shah Vs. State of Gujarat and Others, , it was held by Hon''ble Supreme Court that even the unexplained delay [which was 5 months in that case] in passing the detention order under the Cofeposa would not be sufficient to vitiate the order, if the grounds were not stale and the nexus between the grounds and the order of detention still existed.

(16) In the case of M. Ahamedkutti vs. Union of India J.T. 1990 1 S.C. 1431 the Hon''ble Supreme Court held that where the passage of time is caused by the detenu himself by absconding, the satisfaction of the detaining authority cannot be doubted and the detention cannot be held to be bad on that ground.

(17) In view of the above discussion the writ petition is dismissed. It may, however, be clarified that my conclusions are prima facie for the decision of the present petition only Because the detention order has been challenged only at the pre-execution stage.