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Court : Mumbai

Decided On : Nov-07-2014

Judge : A.S. Oka & a.S. Gadkari

Appeal No. : Criminal Writ Petition No. 3829 of 2014

Appellant : Rohit Ramesh Doshi

Respondent : State of Maharashtra through Additional Chief Secretary (Home) and Others

Judgement :

Oral Judgment: (A.S. Oka, J.)

1. By this Petition under Article 226 of the Constitution of India, an exception is taken to the order of preventive detention passed under sub-section (1) of Section 3 of the Conservation of Foreign Exchange and Prevention of Smuggling Activities Act, 1974 (for short "COFEPOSA") against one Ramesh B. Doshi. The present Petitioner is the son of the detenu. The order of preventive detention has been passed with a view to prevent the Petitioner in future from abetting the smuggling of goods.

2. Considering the grounds of challenge raised by learned counsel appearing for the Petitioner, it will be necessary to make a brief reference to the grounds of

detention. The allegation incorporated in the grounds of detention is that one Vishal Madan was importing PVC / PU coated cloth commonly known as artificial leather cloth through Nhava Sheva port and CFS Mulund. The import was in the name of four different firms as stated in paragraph 2 of the grounds. In paragraph 3 of the grounds, it is stated that after negotiations, the suppliers of the Petitioner, who were Chinese, were transmitting finally negotiated price of goods to be imported to said Vishal through e-mail. However, the Chinese suppliers were sending undervalued invoices for Customs clearance to Vishal by courier and that such undervalued invoices were being used by Vishal for declaring the value in bills of entry filed in the name of four firms through one Surendra Kumar Pandey (Custom House Agent). It is alleged that by adopting this method, Vishal evaded Customs duty to the tune of Rs.40 Crores. It is alleged that the declared value was remitted by Vishal through the bank account of the said four firms. But the difference in the actual value and the declared value was remitted through hawala channel by paying cash in Indian currency to the detenu in the present case.

3. Learned senior counsel appearing for the Petitioner has mainly pressed in service ground set out in clause (ii) of ground A of paragraph 9 of the Petition. The said ground is about the failure of the sponsoring authority to place vital documents before the Detaining Authority and non-consideration of the vital documents by the Detaining Authority. For understanding the purport of ground A(ii), it will be necessary to make a reference to the grounds A(i) and A(ii). The grounds A(i) and A(ii) read thus:

"A(i) THAT, the Sponsoring Authority while proposing issuance of the impugned detention order has selectively placed material before the detaining authority. As evident from the records, copies of the following documents were placed before the Detaining Authority as relevant and incriminating material -

(i) Statements of Shri Vishal Madan (in para 12, 15, 16, 17, 18, 19, 26, 27, 28, 29, 30, 33 and 34), Shri Surendra Pandey (para 22, 23, 24 and 25), and Shri Pal Singh Lohiya (at Sr. No.20 at page 8561 to 8564),

(ii) An order dated 7.12.2012 (at Sr. No.70 at page 8927 -8944) passed by Customs Authority purportedly as a preventive measure on the basis of the report

of Sponsoring Authority for suspending licence of Unison Clearing Services Pvt. Ltd. i.e. the CHA of Shri Vishal Madan, and

(iii) Letter dated 03.01.2013 (at Sr. No.86, Page 9001), wherein Additional Commissioner, Customs specifically requested the Sponsoring Authority, to forward material along with the list of departmental witnesses for initiating proceedings under Regulation 22 of Customs House Agents Licensing Regulations.

A(ii) However the Sponsoring authority suppressed from the Detaining Authority -

(i) The record dated 03.04.2014 of examination / cross-examination of said Shri Vishal Madan in respect of the very same statements, in the said CHA enquiry proceedings, wherein he not only retracted his statements with his explanations on each query, but also specifically denied any role of the detenu in remitting any money abroad on his behalf (copy of the said record dated 3.4.2014 of examination/ cross-examination of Shri Vishal Madan is at EXHIBIT - "F"),

(ii) Examination / Cross-examination of Shri Pal Singh Lohiya conducted on 03.04.2014 in the said CHA enquiry proceedings (copy of the said record dated 3.4.2014 of examination / cross examination of Shri Pal Singh Lohiya is at EXHIBIT - "G"),

(iii) Copy of final order dated 20.02.2013 in Appeal No.C/85091/201-Mum passed by the Hon'ble CESTAT, Mumbai, setting aside the said preventive order dated 07.12.2012 which was passed on the basis of the report of Sponsoring Authority for suspending licence of the CHA of Shri Vishal Madan (copy of the said Order dated 20.02.2013 passed by the Hon'ble CESTAT, Mumbai, is at EXHIBIT-"H"), and

(iv) Copy of the said Appeal C/85091/201-Mum filed before the Hon'ble CESTAT,

(v) Cancellation of the Import Export Code of all four firms of Vishal Madan by Mumbai office of the Director General of Foreign Trade, which forecloses any possibility of import of the subject goods by Shri Vishal Madan by resorting to alleged smuggling, and consequently also rules out any possibility of any alleged

abetting therein by the detenu (copy of the evidence of cancellation of Import Export Code of all four firms of Vishal Madan are at EXHIBIT -"I-COLLY.").

4. The learned senior counsel appearing for the Petitioner pointed out that in the grounds of detention, the Detaining Authority has relied upon statements under Section 108 of the Customs Act, 1962 of said Vishal Madan, Surendra Kumar Pandey and Pal Singh Lohiya. He pointed out that an enquiry was held against said Surendra Pandey under the Customs House Agents Licensing Regulations, 2013 in which on 3rd April 2014 said Vishal was examined and cross-examined on the same statement under Section 108 of the Customs Act relied upon in the grounds of detention. His submission is that the evidence of Vishal in the said statement shows that he has not only retracted the statement under Section 108 by offering an explanation, but he also denied the role played by detenu in remitting any amount abroad as alleged by the Detaining Authority. He pointed out that even Pal Singh Lohiya was examined and cross-examined on the basis of statement under Section 108 relied upon by the Detaining Authority. His submission is that the examination and cross-examination of Vishal made on 3rd April 2014 constitutes a vital document, in as much as it could have affected the subjective satisfaction of the Detaining Authority one way or the other. His submission is that this will apply to even other two statements.

5. He invited our attention to the list of relied upon documents annexed to the grounds of detention. He pointed out that paragraph 41 of the grounds of detention records that the Detaining Authority has referred to and relied upon the documents mentioned in the list appended as Annexure A.. He pointed out that item No.70 in Annexure A is the order dated 7th December 2012 passed by the competent authority in the case of Surendra Pandey (M/s. Unison Clearing Pvt. Ltd.). Learned senior counsel appearing for the Petitioner pointed out that by the order dated 20th February 2013, the CESTAT, Mumbai has set aside the order dated 7th December 2012. He pointed out that even this order of the Appellate Authority was a vital document which was not placed before the Detaining Authority. He placed reliance on the orders at Exhibit I, which according to him are orders of cancellation of the Import Export Code of all the four firms of Vishal which are named in the grounds of detention, which forecloses any possibility of import of the subject goods by

Vishal in future by resorting to alleged smuggling and any other illegality which also rules out any possibility of any alleged abetting by the detenu. He submitted that even these orders of cancellation which are issued on 28th March 2014 were vital documents which could have affected subjective satisfaction of the Detaining Authority one way or the other. He has placed reliance on the several decisions of this Court and the Apex Court.

6. We have heard the learned APP representing the Detaining Authority and learned counsel representing the Sponsoring Authority. The learned APP appearing for the Detaining Authority relied upon a decision of this Court to which one of us (A.S.Oka, J.) is a member. The said decision is in the case of Anjana Rikabchand Mehta v. The State of Maharashtra, 2014 ALL MR (Cri) 1586. His submission is that even if the examination / cross-examination is held to be a vital document and even if Section 5A of the COFEPOSA is held as not applicable, the statement of Vishal is not the only material which is considered by the Detaining Authority for arriving at the subjective satisfaction. He invited our attention to paragraph 34 of the said decision. He has also relied upon a decision of the Apex Court in the case of Baby Devassy Chully alias Bobby v. Union of India (2013) 4 SCC 531. He placed reliance upon another decision of the Apex Court in the case of Usha Agarwal v. Union of India (2007) 1 SCC 295. He also relied upon a decision of the Apex Court in the case of Madan Lal Anand v. Union of India AIR 1990 SC 176. Lastly he relied upon a decision in the case of Vinod K. Chawla v. Union of India, (2006) 7 SCC 337.

The learned APP did not dispute that the examination / cross-examination of Vishal was not placed before the Detaining Authority. His submission is that the statements of Vishal and other two under Section 108 was not the only material before the Detaining Authority. He pointed out that apart from the stand taken by the Detaining Authority that the documents on which the Petitioner is relying upon are not vital documents, He pointed out that the Detaining Authority has stated in the affidavit that consideration of the said documents would not have affected her subjective satisfaction. Inviting our attention to the grounds of detention, he urged that the order dated 7th December 2012 passed by the Customs Authorities in relation to Surendra Pandey is not the only material considered. He pointed out

that even the cancellation of Import Export Code in relation to all the four firms of Vishal has no bearing on the allegation that Vishal was indulging in smuggling. His submission is that merely because licences were cancelled, it could not be said that Vishal would not indulge in smuggling activities.

7. Learned counsel representing the Sponsoring Authority urged that the examination / cross-examination of Vishal and other witnesses is recorded in an altogether different proceedings which has no bearing on the preventive detention. She urged that apart from the fact that the said documents cannot be said to be vital documents, the detenu has not retracted his two statements recorded under Section 108 of the Customs Act on 9th October 2012 and 12th October 2012 in which he has admitted that he was involved in Hawala transaction. Her submission is that even assuming that Vishal and others have retracted their statements under Section 108, as the Petitioner has not retracted his statement, the statements of Vishal showing retraction of his statement cannot be treated as vital documents. Inviting our attention to the decision of the Division Bench of this Court in the case of Sharifa Abubaker Zariwala v. The Union of India, 1996 II LJ 205 = 1997 ALL MR (Cri) 528, she urged that it is necessary to consider whether the material which was not placed before the Detaining Authority is vital from the point of view of recording subjective satisfaction. She, therefore, submitted that no interference is called for with the impugned order.

8. We have given careful consideration to the submissions. As far as the scope of adjudication in such matters is concerned, it will be necessary to make a reference to the decision of a Division Bench this Court in the case of Irfan Ibrahim Qadri v. Medha Gadgil, 2013(2) Bom CR (Cri) 423. In paragraph 11 the Division has held thus :

"11. Before dealing with the issue whether the bail order is a vital document, it must be noted here that this Court is not examining the correctness of the decision of the Detaining Authority, but this Court is examining the decision making process. An order of preventive detention is always based on subjective satisfaction of the Detaining Authority. Every document which may affect the subjective satisfaction of the Detaining Authority one way or the other is a vital

document and the said document should not be kept back from the Detaining Authority. This Court cannot go into the question as to what could have been the effect on the subjective satisfaction of the Detaining Authority on consideration of a vital and relevant document. This Court has to consider only the question whether a vital document which may have affected the subjective satisfaction is kept away from the Detaining Authority. The reason being that non-placement or non-consideration of a vital document affects the decision making process of the Detaining Authority of recording subjective satisfaction."

9. This Court in the above decision has reiterated the law laid down by the Apex Court in the case of *Sunila Jain v. Union of India*, (2006) 3 SCC 321 and other relevant decisions. At this stage, it would be necessary to make a reference to the decision of the Apex Court in the case of *Ayya alias Ayub v. State of U.P.*, (1989) 1 SCC 374. In paragraph 28 of the said decision, the Apex Court has held thus :

"28. What weight the contents and assertions in the telegram should carry is an altogether a different matter. It is not disputed that the telegram was not placed before and considered by the detaining authority. There would be vitiation of the detention on grounds of non-application of mind if a piece of evidence, which was relevant though not binding, had not been considered at all. If a piece of evidence which might reasonably have affected the decision whether or not to pass an order of detention is excluded from consideration, there would be a failure of application of mind which, in turn, vitiates the detention. The detaining authority might very well have come to the same conclusion after considering this material; but in the facts of the case the omission to consider the material assumes materiality."

10. The question is whether a document which may have reasonably affected the decision of the Detaining Authority, has been excluded from the consideration. If the answer to the said question is in the affirmative, there would be failure of application of mind which would vitiate the order of detention. In the case of *Vinod Chawla* relied upon by the learned APP, the issue was whether the order is vitiated on account of the failure to place before the Detaining Authority the retraction of the statement made by the son of detenu. In the facts of the case, the Apex Court has held that the retraction has not affected the opinion of the

Detaining Authority. In short, it was held that retraction by the son of the detenu is not a vital document.

11. In the case of Madan Lal Anand relied upon by the learned APP, again the Apex Court on facts held that failure to consider the retraction of confessional statement of the detenu, will not render the order bad. However, this finding was arrived at on the ground that Section 5A of COFEPOSA was applicable and such order of detention shall be deemed to have been made separately on each of several grounds. Therefore, the Apex Court held that it was permissible to exclude inadmissible grounds. In the case in hand, Section 5A is not pressed into service by the Respondents. Even in the case of Baby Devassy Chully alias Bobby, the Apex Court rejected the contention on the basis of facts. This was a case where it was held that the detaining authority had merely referred to the retraction statement of the co-accused only by way of narration of facts and therefore, confessional statement of the said accused was not a vital document. In the case of Anjana Rikabchand Mehta, this Court in paragraph 24 observed that the retracted statement of a co-detenu was not the only material which was considered and the Detaining Authority had relied upon the statements of 14 other persons which were not retracted. Therefore, the settled law that non-placement and consequent non-consideration of vital documents vitiates the order of preventive detention has not been disturbed even in the decisions relied upon by the Respondents.

On this aspect, it is also necessary to place reference to the decision of the Apex Court in the case of Usha Agarwal relied upon by the learned APP and in particular, paragraph 11 thereof. In paragraph 11, the Apex Court held thus :

"The sponsoring authority should not undertake any exercise of examination and interpretation of the available material with a view to place the documents selectively before the detaining authority. It is not for the sponsoring authority to decide as to which of the relevant documents should be placed before the detaining authority, or which of the documents are likely to help, or not help the prospective detenu. Consequently, the sponsoring authority cannot exclude any particular document from the material to be placed before the detaining authority.

If the relevant facts or documents which may influence the subjective satisfaction of the detaining authority on the question whether or not to make the detention order, are not placed before the detaining authority, or are not considered by the detaining authority, it may vitiate the detention order itself. It is no answer to say that the exclusion of a relevant document did not affect the decision to detain a person, in view of the other documents that were placed before the detaining authority or that the detaining authority would have come to the same conclusion even if it had considered the said document - vide *Attorney General for India v. Amratlal Prajivandas*, (1994) 5 SCC 54 : 1994 SCC (Cri) 1325, *Ashadevi v. K. Shivraj*, (1979) 1 SCC 222 : 1979 SCC (Cri) 262, *Sita Ram Somani v. State of Rajasthan*, (1986) 2 SCC 86 : 1986 SCC (Cri) 104, *Ayya v. State of U.P.*, (1989) 1 SCC 374 : 1989 SCC (Cri) 153 and *Ahamed Nassar v. State of T.N.*, (1999) 8 SCC 473 : 1999 SCC (Cri) 1469."

12. Therefore, the only question which arises for consideration is whether the documents in question were vital documents which could have affected the subjective satisfaction of the Detaining Authority.

13. We must reiterate here that on perusal of the grounds of detention, it appears that the subjective satisfaction recorded by the Detaining Authority is that the detenu has abetted the smuggling activities of said Vishal Madan. The grounds of detention note that Vishal was carrying on business of import under the name and style of four different concerns. The modus adopted by Vishal was of using undervalued invoices obtained from Chinese suppliers of the goods for Customs clearance. Such undervalued invoices were used by Vishal for declaring the value of goods in bills of entry filed in the names of the four firms through Custom House Agent, Surendra Pandey, who was carrying on business under the name and style of Unison Clearing Services Pvt. Ltd. Thus, it is alleged that this was the method adopted by Vishal for evading Customs duty. The allegation against the detenu is that the said Vishal paid the difference between the actual negotiated value and the declared value in Indian currency to the detenu who remitted it to the suppliers through Hawala channel. The allegation is that detenu abetted the smuggling activity of Vishal by sending the differential amount through Hawala channel to the Chinese suppliers.

14. Perusal of the grounds of detention show that in paragraph Nos.12, 15 to 19, 26 to 30 and 33 and 34 the statements of Vishal under Section 108 of the Customs Act have been relied upon by the Detaining Authority. In paragraph 35 of the grounds, it is stated that:

"35. You had admitted that you were the active participant in transfer of Rs.50 crores on behalf of the importer, Vishal Madanlal Madan to the overseas suppliers through hawala (non-banking channels). The importer has been undervaluing the import of artificial leather cloth and has been remitting the differential amount i.e. the difference between the actual value and the declared value to Customs through non banking channels. You had assisted the importer in transmitting Rs.50 crores. Such illegal money transfers out of the country have wider ramifications as it undermines the nation's economy and jeopardizing the same."

15. Neither the Detaining Authority nor the Sponsoring Authority have disputed that the examination and cross-examination of Vishal in CHA enquiry proceeding was on the basis of the statements under Section 108 which are extensively relied upon by the Detaining Authority. Only with a view to ascertain whether the said examination / cross-examination can be said to constitute a vital document, we have perused the examination and cross-examination. We have perused the cross-examination of Vishal by APO. In the cross-examination, Vishal has denied all the allegations made against him. He has stated that the detenu is a local angadia to whom he used to give cash for local and inter-city transfer within India and therefore, his statement recorded is not correct and that is the reason why he has retracted the statement. The statement of the detenu under Section 108 is that Vishal used to pay him in Indian currency and that he has been remitting the said money to China for the benefit of Vishal. Vishal stated that even the said statement was incorrect. The statement of detenu that he has remitted amounts to China for Vishal was put to Vishal in his cross-examination. He has stated that the statement was incorrect.

16. We have perused the statements of the detenu dated 9th October 2012 and 12th October 2012 under Section 108 of the Customs Act. Taking the statements as correct, we find that the detenu has not stated that he was aware of the

smuggling activity of Vishal. He has also not stated that the amount which used to be handed over to him by Vishal for transmitting the same to China represented the differential amount between the actual negotiated value of the goods imported by Vishal and the declared value. Taking the statements as it is, all that the statements record is that on instructions of Vishal, he has remitted Rs.50 Crores to China during the period of three years through Hawala channel. Even taking the statements as correct, knowledge on the part of the detenu of smuggling activities carried on by Vishal cannot be even inferred. At the highest, the statements will show that the detenu was a part of Hawala racket.

17. The subjective satisfaction of the Detaining Authority as regards the smuggling activities carried out by Vishal is based on his statements under Section 108 of the Customs Act. In the deposition before the CHA enquiry, Vishal has purported to explain the statements under Section 108. In fact, the cross-examination of Vishal show that he has retracted the statements under Section 108. He has specifically denied the involvement of the detenu.

18. As stated earlier, the only ground on which the order of detention is passed is of preventing the detenu from indulging in abetting smuggling activities. The satisfaction recorded by the Detaining Authority that Vishal has indulged in smuggling activities appears to be based only on the statements of Vishal under Section 108 as the said statements have been extensively relied upon by the Detaining Authority in several paragraphs of the grounds. Therefore, we are of the considered view that the statements made by Vishal in his cross-examination were really vital as he has denied that he was involved in smuggling and he has also denied the correctness of the statements of detenu under Section 108. The deposition of Vishal before the Authority would have certainly affected the subjective satisfaction of the Detaining Authority one way or the other. It is an admitted position that the deposition was not placed before the Detaining Authority. As stated earlier, this Court is not examining the correctness of the decision making process. Now by filing a reply, the Detaining Authority after considering the documents which were not placed before her, cannot support the order of detention by contending that notwithstanding the withheld documents, it was a case for passing an order of preventive detention. As we find that the said

vital document was not placed before the Detaining Authority and was not considered by the Detaining Authority, it amounts to non-application of mind by the Detaining Authority and the order of detention stands vitiated. We have already pointed out that the statements of the detenu under Section 108 do not record that he was aware of the smuggling activities of Vishal and that the money which he allegedly transmitted through Hawala racket was the money in connection with the smuggling activities of Vishal.

19. Therefore, in the facts of the case, we find that the subjective satisfaction is vitiated due to non-consideration of the vital document.

20. Therefore, the Petition must succeed and we pass the following order:

a) Rule is made absolute in terms of prayer clause (a) which reads thus :

"That this Hon'ble Court be pleased to issue a Writ of Habeas Corpus or any other appropriate Writ, Order or direction quashing and setting aside the impugned order of detention bearing No.PSA-1213 / CR-71(2) / SPL -3(A) dated 04-07-2012 issued by Respondent No.2 against the detenu Shri Ramesh B. Doshi detained at Nashik Road Central Prison, and to set him at liberty with consequential reliefs."

b) All concerned to act on an authenticated copy of the operative part of this judgment and order.

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