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SharafuddIn Vs. Union of India and ors.

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Court : Delhi

Decided On : Sep-05-1988

Reported in : 36(1988)DLT354

Judge : M.K. Chawla, J.

Acts : Foreign Exchange and Prevention of Smuggling Activities Act, 1974 - Sections 3

Appeal No. : Criminal Writ Appeal No. 182 of 1988

Appellant : Sharafuddin

Respondent : Union of India and ors.

Advocate for Pet/Ap. : Harjinder Singh,; Rohit Kochhar,; Naveen Malhotra,;

Judgement :

M.K. Chawla, J.

(1) On April 14, 1986, one Shri K.T. Mohd. Ibrahim of Chowghat, Trichur District, landed at Trivendrum airport from Abu Dhabi by Air India flight no. AI-921. After health and immigration clearance, he gave and signed a declaration informing that he is carrying goods of the total value of Rs. 8390.00 . He was asked by the Customs Officer whether he was in possession of any gold, gold ornaments or any other good in excess of what he has declared. He answered in the negative. On

suspicion, his baggage was examined. As a result, two gold biscuits concealed in two 'sovereign king size cigarette packets using adhesive tapes were recovered. The examination of his Hitachi Vcr resulted in the recovery of six gold's biscuits pasted with adhesive tapes. The total weight of the 8 gold biscuits was found to be 928 grams and its market value was assessed at Rs. 2, 04.880.00 . He did not produce any documentation for licit importation of the 8 gold biscuits, recovered from his baggage.

(2) His personal search resulted in the recovery of 4 letters alleged to have been written by a person, to his brother-in-law, wife, parents and friends. Extracts from one of the letters addressed to the present petitioner indicated that part of the gold consignment was meant to be delivered to him against payment.

(3) On the same day, Shri K.T. Mohd. Ibrahim gave a voluntary statement in his own hand under section 108 of the Customs Act, admitting the recovery of the gold biscuits from his baggage and the incriminating documents/letters from his personal search. He was arrested there and then.

(4) As a follow up action, the residence of the present petitioner was searched by the officers of Cp & I Unit, Trivendrum on 21st August, 1986 but nothing incriminating was recovered.

(5) On 27th August, 1986, the petitioner was summoned by the Superintendent. Cp & I Unit, Trivendrum and his statement was recorded. He was not arrested either under the Customs Act or the Gold Control Act. On 9th October, 1986, a show cause notice was issued by the Collector of Central Excise and Customs, Broadway, Cochin against 5 persons, including the petitioner. The petitioner sent the reply on 28th August, 1986. The matter was fixed for hearing on 22nd December, 1986.

(6) On 3rd of January, 1987, Shri M. Dandapani Commissioner and Secretary to the Government of Kerala, passed the impugned order of detention under Section 3(1)(ii) of the Conservation of Foreign Exchange and Prevention of Smuggling Activities Act, 1974 (hereinafter called the Cofeposa Act) against the petitioner with a view to preventing him from abetting in smuggling gold. The order Along

with the grounds of detention were served on the petitioner on 2nd April, 1987. Shri M.L.Wadhawan Additional Secretary to the Government of India, after having satisfied himself from the material already served on the detenu, issued a declaration under Section 9(1) of the Cofeposa Act on 5th of May, 1987, extending the period of detention for another one year.

(7) On 7th May, 1987. the petitioner addressed a representation to the detaining authority as well as the Central Government. These were summarily rejected vide orders dated 4th June, 1987 and 8th June. 1987 respectively.

(8) In the present writ petition, the detenu has challenged the virus of the impugned order of detention dated 3rd January, 1987 and his continued detention by virtue of declaration under Section 9(1) of the Cofeposa Act dated 5th May, 1987.

(9) The main submission of the learned counsel for the petitioner is that the sponsoring authority has intentionally suppressed the material facts/ documents from the detaining authority as well as from the declaring authority which vitiates the order of detention and his continued detention. In support of this plea, learned counsel refers to ground no. Vi of the petition containing the list of as many as six documents which have been placed before the detaining authority, but during the course of arguments reliance was placed only on the following material documents :

'(A)That a show cause notice dated 9.10.86 was issued by the Collector of Customs and Central Excise, Broadway, Cochin and a further corrigendum was issued on 30.10.86, (b) A reply to the said show cause notice was filed by the petitioner and co-notice's denying the allegations contained in the show cause notice and retracting from the alleged statements ; (c) The bail applications filed by Shri K.T. Mohd. Ibrahim s/o V.K. Saidu, the order on the bail passed by the Chief Judicial Magistrate, Economic Offences, Erunakulam.'

The contention of the learned counsel is that had these documents been placed before the appropriate authorities, there was every possibility of making up their mind either way, whether to pass or not to pass the order of detention, or the

declaration.

(10) The plea of the respondents in the counter-affidavit of Shri Rajashekhran Nair, Addl. Secretary to the Government of Kerala is :

'ALL the relevant and material documents were placed before the detaining authority. Moreover, the pendency of adjudication and prosecution proceedings were intimated to the detaining authority. thereforee, much credence could not be attached to a belated retraction in a bail application of a co-detent. There is no suppression, as alleged.'

On the basis of this stand, the contention of the learned counsel for the respondents is that even though the show cause notice and its reply by the petitioner formed part of the adjudication proceedings, but these documents were neither relevant nor material for arriving at the subjective satisfaction of the detaining authority to pass the impugned order of detention. On the same analogy, it is submitted that the bail applications of the co-detent and the orders passed by the Chief Judicial Magistrate, Erunakulam were rightly withheld.

(11) This stand of the respondents has been deprecated in numerous judgments of the Supreme Court and various High Courts. The substance of the ratio of those Judgments is that the show cause notice and the detenu's reply, even though formed part of the adjudication proceedings, constituted the most relevant material, which was essential to be placed before the detaining authority before the issuance of the impugned order of detention. These documents certainly have a bearing and would have influenced the 'subjective satisfaction of the detaining authority in one way or the other.

(12) In the present case, this sacred duty has not been performed by the sponsoring authority. The detaining authority has been kept in the dark. In the result, not only the subjective satisfaction of the detaining authority is vitiated but its order also is liable to be quashed.

(13) In the recent Judgment of this Court in Shri Umminiyattil Marakhar Hazi v. U.O.I. & Ors. (Crl. W.P. No. 181/88) decided by me (M.K. Chawla, J.), this very

view has been reaffirmed. In the said case, reliance wag placed on the Supreme Court Judgment reported as Khurjibhai Dhanjibhai Patel v. State of Gujarat and Ors. Crl. Appeal No. 332/84 decided on April 16, 1985, and another Judgment of this Court reported as Kuriniyan Saidalikutty v. U.O.I, and Ors. (Crl. W. 266/87) decided by P.K. Bahri, J. on October 13.1987.

(14) Once the respondents admit the issuance of a show cause notice and the receipt of reply from the detenu, disclosing the compelling circumstances under which his statement was recorded, coupled with his retraction, which formed part of the adjudication proceedings, it was incumbent upon the authorities to place the material, which had a bearing on the satisfaction of the detaining authority either way, at the time of the passing of the impugned order of detention. The respondents cannot get away with the plea that the detaining authority was made aware of the fact of the pendency of the adjudication proceedings. This is not the requirement of law. On this short ground, the order of detention dated 3.1.1981 is liable to be quashed.

(15) As observed earlier, by order dated 5th May, 1987, Shri M.L. Wadhawan, Addl. Secretary to the Government of India, issued a declaration u/s 9(1) of the Cofeposa Act for the continued detention of the petitioner for another period of one year. Part no. 2 of the said order reads as under:

'AND whereas I, the undersigned specially empowered in this behalf by the Central Government have carefully considered the grounds of detention and the material served on the detenu Along with the English translation of the documents which are enclosed here with.'

The plea of the respondent as disclosed in the counter-affidavit of Raja Shekhran Nair is that the declaration under Section 9(1) of the Cofeposa Act was issued by the proper authority on the basis of the same documents on which detention order was issued, and these documents were already with the detenu.

(16) The bare reading of the format of declaration and the affidavit of Shri Nair indicate that the order was passed on the same material and the documents which were before the detaining authority. As observed earlier, the copies of the show

cause notice, its reply by the detenu and the bail application of the co-detents were not before the detaining authority. The copies of these documents were not supplied to the detenu even though asked for in the representation. The satisfaction of the detaining authority has been held to be vitiated on this account. As a necessary corollary, the declaration under Section 9(1) of the Cofeposa Act has also been declared null and void for omitting to look into the most relevant and material documents.

(17) In the result, the detention and the continued detention of the petitioner is illegal and vocative of Articles 14, 19, 21 and 22 of the Constitution of India. The petition is accepted and the order of detention and the declaration u/s 9(1) of the Cofeposa Act are set aside. The accused be set at liberty forthwith, if not required to be detained in any other case.

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