

Sandip Agarwal and anr. Vs. Union of India (Uoi) and ors.

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Court : Kolkata

Decided On : Jun-10-2005

Reported in : 2005(3)CHN657,2005CriLJ3611

Judge : Pranab Kumar Chattopadhyay, J.

Acts : [Conservation of Foreign Exchange and Prevention of Smuggling Activities Act, 1974](#) - Section 3(1); ;Customs Act - Sections 2(39), 111 and 113; ;[Constitution of India](#) - Article 22(5); ;Conservation of Foreign Exchange and Prevention of Smuggling Activities Law

Appeal No. : W.P. No. 1989 of 2004

Appellant : Sandip Agarwal and anr.

Respondent : Union of India (Uoi) and ors.

Advocate for Def. : R.N. Das and ;Siddhartha Chatterjee, Advs., ;S.K. Kapoor and ;Biswanath Samadder, Advs. for the respondent No. 2

Advocate for Pet/Ap. : Anindya Mitra, ;Shibdas Banerjee, ;Pratap Chatterjee, ;Abhrajit Mitra and ;Arundhati Banerjee, Advs.; Abha Roy and ;Abhra Mukherjee, Advs.

Disposition : Petition dismissed

Judgement :

Pranab Kurnar Chattopadhyay, J.

1. In this writ petition, validity and/or legality of the order dated 19th August, 2004 issued under Section 3(1) of the [Conservation of Foreign Exchange and Prevention of Smuggling Activities Act, 1974](#) (COFEPOSA) directing detention of the petitioner No. 1 has been challenged by the petitioners herein.

2. The petitioners have specifically stated in the writ petition that the issuance of the aforesaid detention order by the respondent authorities came to their notice from an advertisement published at the instance of the Government of India in 'The Statesman' dated 6th November, 2004. In the said advertisement it was also stated that the petitioner No. 1 (Sandip Agarwal) had absconded or concealed himself so that the order of detention could not be implemented. Accordingly, a further order dated 23rd September, 2004 had been passed directing the said petitioner No. 1 to appear before the respondent No. 3, the Commissioner of Police, Kolkata.

3. It has been specifically submitted on behalf of the petitioners that no attempt was made by the respondents to serve the said detention order upon the petitioner No. 1 even though the said petitioner No. 1 had been regularly visiting the office of the Joint Director General of Foreign Trade. It has also been submitted on behalf of the petitioners that the impugned order of detention was passed for a wrong purpose and the same, therefore, should be quashed even at the pre-execution stage.

4. It has further been submitted on behalf of the petitioners that the aforesaid impugned detention order is liable to be quashed on the ground of delay alone as the inordinate delay in issuing the aforesaid detention order has not been explained by the respondents herein.

5. Respondent authorities herein did not file any affidavit disclosing the reasons and/or grounds for issuing the aforesaid impugned detention order to the petitioner No. 1 and therefore, the petitioners herein had no scope and/or opportunity to question the validity and/or sufficiency of the said reasons and/ or grounds which prompted the concerned respondents herein to issue the impugned detention

order in respect of the petitioner No. 1.

6. Mr. Kapoor, learned Senior Counsel representing the respondent No. 2 submits that the petitioner No. 1 would be appraised of the reasons and/or grounds for issuance of the aforesaid detention order when the same would be served upon the petitioner No. 1.

7. In the present case, the petitioners herein have challenged the impugned detention order at the pre-execution stage without having any knowledge about the reasons and/or grounds for issuance of the aforesaid impugned detention order and therefore, could not question the validity and/or sufficiency of the aforesaid reasons for issuance of the impugned detention order at this stage. In absence of service of the impugned detention order, the relevant materials containing reasons and/or grounds for issuance of the said impugned order of detention could not be disclosed to the petitioners nor this Court had any opportunity to examine the said materials at this stage. Undisputedly, at the pre-execution stage, scope for challenging the detention order is very limited.

8. An order of detention can be struck down at the pre-execution stage in the rarest of rare cases on certain specified limited grounds, which have been summarised by the Hon'ble Supreme Court of India in the case of Additional Secretary to the Government of India and Ors. v. Alka Subhash Gadia and Anr., reported in 1992 Supp (1) SCC 496. The relevant portion of the aforesaid decision is quoted hereunder:

'30...The Courts have the necessary power and they have used it in proper cases as has been pointed out above, although such cases have been few and the grounds on which the Courts have interfered with them at the pre-execution stage are necessarily very limited in scope and number, viz., where the Courts are prima facie satisfied (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.... '

9. The principles enunciated in the aforesaid decision have been reiterated and reaffirmed in subsequent decisions of the Hon'ble Supreme Court, which would be discussed afterwards.

10. However, in the present case, out of the aforesaid five grounds mentioned in the case of Additional Secretary to the Government of India and Ors. v. Alka Subhash Gadia and Anr. (supra), ground Nos. (i), (ii) and (v) have no manner of application.

11. The learned Counsel appearing on behalf of the petitioners submits that the impugned detention order can be challenged before this Court in the present writ petition even at the pre-execution stage in view of the ground Nos. (iii) and (iv) mentioned in the aforesaid decision in the case of Alka Subhash Gadia (supra). It has been argued on behalf of the petitioners that the impugned detention order has been passed for a wrong purpose and also on vague, extraneous and irrelevant grounds.

12. Mr. Kapoor, learned Senior Counsel appearing on behalf of the respondent No. 2 submits that in absence of service of the detention order, not only the materials containing the grounds for issuing the impugned detention order can be made available to the petitioner but at the same time, this Court also would not get an opportunity to examine the same in an appropriate manner.

13. Referring to the aforesaid decision of the Hon'ble Supreme Court in the case of Additional Secretary to the Government of India and Ors. v. Alka Subhash Gadia and Anr., reported in 1992 Supp(1) SCC 496 and also in the case of Sayed Taher Bawamiya v. Joint Secretary to the Govt. of India and Ors., reported in : 2002 CriLJ259 , Mr. Kapoor submits that the detention order passed on vague, extraneous and irrelevant grounds can be examined by this Court only after service of the detention order upon the petitioner No. 1 with relevant paper, documents and materials. Mr. Kapoor further submits that any contention challenging the detention order on the ground that it was passed on vague, extraneous and irrelevant grounds would necessarily involve an investigation into the facts.

14. The facts and reasons for which the detention order has been issued to the petitioner No. 1 can only appear from the detention order itself. Accordingly, the grounds on which the impugned detention order has been issued can be challenged before and adjudicated by the Court after examination of the relevant materials. Undisputedly, those materials can be made available only after supply of the impugned detention order to the concerned person.

15. Whether the petitioner is entitled to the order of detention prior to its execution has been specifically examined, by the Hon'ble Supreme Court in the case of Alka Subhash Gadia and Anr. (supra). The relevant paragraph of the said decision is quoted hereunder:

'32. This still leaves open the question as to whether the detenu is entitled to the order of detention prior to its execution at least to verify whether it can be challenged at its pre-execution stage on the limited grounds available. In view of the discussion aforesaid, the answer to this question has to be firmly in the negative for various reasons. In the first instance, as stated earlier, the Constitution and the valid law made thereunder do not make any provision for the same. On the other hand, they permit the arrest and detention of a person without furnishing to the detenu the order and the grounds thereof in advance. Secondly, when the order and the grounds are served and the detenu is in a position to make out prima facie the limited grounds on which they can be successfully challenged, the Courts, as pointed out earlier, have power even to grant bail to the detenu pending the final hearing of his petition. Alternatively, as stated earlier, the Court can and does hear such petition expeditiously to give the necessary relief to the detenu. Thirdly, in the rare cases where the detenu, before being served with them, learns of the detention order and the grounds on which it is made, and satisfies the Court of their existence by proper affirmation, the Court does not decline to entertain the writ petition even at the pre-execution stage, of course, on the very limited grounds stated above. The Court no doubt even in such cases is not obliged to interfere with the impugned order at that stage and may insist that the detenu should first submit to it. It will, however, depend on the facts of each case. The decisions and the orders cited above show that in some genuine cases, the Courts have exercised their powers at the pre-execution stage, though such

cases have been rare. This only emphasises the fact that the Courts have power to interfere with the detention orders even at the pre-execution stage but they are not obliged to do so nor will it be proper for them to do so save in exceptional cases. Much less can a detenu claim such exercise of power as a matter of right. The discretion is of the Court and it has to be exercised judicially on well-settled principles.'

16. It has also been argued by the learned Counsel of the petitioners that the detention order was made for a wrong purpose and in support of the aforesaid contention, Mr. Anindya Mitra, learned Senior Counsel representing the petitioners submitted as hereunder:

- 1) The detention order had been issued because the petitioner had instituted legal proceedings, which had resulted in an order being made by the Supreme Court in his favour, and this had upset the authorities.
- 2) Sandip Agarwal had stopped carrying on business since the month of November, 2003.
- 3) Since he had stopped carrying on business it could not be contended by the respondent authorities that he would be indulging in smuggling in future.
- 4) The COFEPOSA law was enacted to prevent smuggling and if Sandip Agarwal was not likely to indulge in smuggling at all because he has put himself out of business, therefore, the detention order ought to be quashed since it was passed for a wrong purpose.
- 5) The detention order could not have any 'nexus' with the object of the COFEPOSA Act, which was to provide for 'prevention of smuggling activities'.
- 6) Since the respondents had not filed any affidavit-in-opposition, this Hon'ble Court was asked to draw an adverse inference that the Government had no material on record to arrive at the conclusion that Sandip Agarwal was likely to be guilty of smuggling in future.

17. Mr. Mitra further submits that the purpose of detention under COFEPOSA has been succinctly laid down by the Supreme Court in the case of Rajesh Gulati v. Government of NCT of Delhi and Anr., reported in : 2002 CriLJ4299 , which is set out hereinbelow:

'12. It cannot be overemphasized that the object of detention under the Act is not to punish but to prevent the commission of certain offences. Section 3(1) of the Act allows the detention of a person only if the appropriate detaining authority is satisfied that with a view to preventing such person from carrying on any of the offensive activities enumerated therein, it is necessary to detain such person. The satisfaction of the detaining authority is not a subjective one based on the detaining authority's emotions, beliefs or prejudices. There must be a real likelihood of the person being able to indulge in such activities, the inference of such likelihood being drawn from objective data.'

18. According to Mr. Mitra, the detaining authority has to be satisfied that there is 'real likelihood' of the person carrying out any of the offensive activities enumerated in Section 3(1) of COFEPOSA. It has also been contended on behalf of the petitioners that in the event, Court finds that there was no basis for the detaining authority to come to the conclusion that there is 'real likelihood of the person indulging in such activity then in that case, the detention order may be held to have been 'passed for a wrong purpose'.

19. Mr. Kapoor, learned Senior Counsel appearing on behalf of the respondent No. 2, however, submits that the earlier proceedings initiated by the petitioners herein and ultimately decided by the Hon'ble Supreme Court arose out of a demand of the petitioners for revalidation of the advance licenses. Mr. Kapoor further submits that the said proceeding was really directed against the Director General of Foreign Trade, a separate statutory authority dealing with the issues relating to licenses and/or advance licenses. According to the learned Counsel of the respondent No. 2 the said Director General of Foreign Trade is not a wing or department of the customs authorities.

20. Mr. Kapoor submits that the Directorate of Revenue Intelligence is an altogether separate branch of the customs organisation, which conducted search

and seizure in respect of the business premises and dealings of the petitioner No. 1 and ultimately decided to issue the impugned detention order pursuant to the said search and seizure. Mr. Kapoor further submits that the Directorate of Revenue Intelligence was not in any way concerned with the earlier proceedings relating to revalidation of advance licenses of the petitioners and was also not made a party in the said proceedings.

21. Mr. Kapoor specifically submits that the earlier proceeding was initiated in the year 2002 and the Directorate of Revenue Intelligence on the basis of the information received from various sources have conducted its searches and seizures on 7th November, 2002. The circumstances and the results of the said search and seizure were never disclosed before the Supreme Court in connection with the earlier proceeding, as the Directorate of Revenue Intelligence was not a party before the Supreme Court. According to Mr. Kapoor, the Supreme Court passed its order only in relation to the issue regarding revalidation of the licenses on January 15, 2004.

22. Referring to the decision of the Hon'ble Supreme Court in the case of Alka Subhash Gadia and Anr. (supra), Mr. Kapoor submits that a correct reading of the said judgment will show that in using the expression 'wrong purpose' the Court was not laying down that the purpose of the detention order could be gone into at the pre-execution stage.

23. In order to decide whether the impugned detention order has been passed for a 'wrong purpose', proper investigation into the facts cannot be avoided and in my view, such investigation into the facts cannot be done without the detention order.

24. In the present case, detention order has not yet been served upon the petitioner and the grounds of the said detention order are not yet known to the petitioner and obviously not available to this Court. In the aforesaid circumstances, it is difficult to come to the conclusion that the said detention order has been passed for a 'wrong purpose' as has been alleged on behalf of the petitioners herein.

25. In the event, the petitioners herein contend that the exercise of power relating to the issuance of the impugned detention order to the petitioner No. 1 is contrary to the objects of COFEPOSA then the petitioners will have to . demonstrate the factual basis on which the said power has been exercised by the concerned authority. The petitioner No. 1 is admittedly not aware of the grounds of detention as the impugned detention order has not yet been served upon the petitioner No. 1 and as such the said petitioner No. 1 cannot contend at the pre-execution stage that the action of the respondent authorities is contrary to the objects of COFEPOSA or that power has been exercised by the respondent authorities for a 'wrong purpose'.

26. Although it has been categorically submitted on behalf of the petitioners that the petitioner No. 1 had stopped carrying on business in November, 2003 but from the documents annexed with this writ petition, it cannot be said without any fear of contradiction that the petitioner No. 1 had stopped carrying on business since November, 2003. Mr. Kapoor invited the attention of this Court to various documents annexed with this writ petition in order to establish that the said petitioner No. 1 had been carrying on business even after November, 2003.

27. Mr. Kapoor specifically referred to the representation of the petitioner No. 1 as the Director of the petitioner No. 2 dated 14th September, 2004 addressed to the Zonal Joint Director General of Foreign Trade wherein the said petitioner No. 1 specifically claimed himself as the manufacturer and exporter of handloom made natural silk fabrics. The relevant portion from the said representation dated 14th September, 2004 is quoted hereunder:

'That I am manufacturer and exporter of handloom made natural silk fabrics....'

28. The aforesaid document, prima facie, goes to show that the petitioner No. 1 was carrying on business as exporter at least till 14th September, 2004.

29. Mr. Mitra, learned Senior Counsel of the petitioners referred to and relied upon a decision of the Supreme Court in the case of Pawan Bhartiya v. Union of India and Anr., reported in : (2003)11SCC479 , in support of the contention that the detention order is liable to be quashed as the person concerned has ceased its

activities in the field of export and import. Mr. Mitra also referred to the decision of the Supreme Court in the case of *Rajesh Gulati v. Government of NCT of Delhi and Anr.*, reported in : 2002 CriLJ4299 .

30. In my view, the aforesaid decisions are not at all applicable in the facts of the present case as I have already observed on the basis of the documents available before this Court at this stage that it cannot be said that the petitioner No. 1 has stopped his activities in the field of export.

31. Furthermore, the facts of the *Rajesh Gulati* case are admittedly of a post-detention case where the Hon'ble Supreme Court had occasion to consider the detention order and the relevant grounds on the basis whereof the said detention order was issued by the concerned respondent.

32. Mr. Mitra also cited another decision of the Supreme Court in the case of *Sk. Serajul v. State of West Bengal*, reported in : AIR 1975 SC1517 , in support of the proposition that there is no explanation for the delay in issuing the order of detention from the time of occurrence of the last incident.

33. Considering the undisputed documents available before this Court at this stage, it cannot be said that there was delay in making the order of detention by the concerned respondent and as such the aforesaid decision cannot come to the aid of the petitioners. Furthermore, the petitioners herein refused to surrender even after coming to know of the impugned detention order and therefore, cannot raise any plea regarding delay in execution of the impugned order of detention.

34. The aforesaid aspect has been considered by the Hon'ble Supreme Court in the case of *Hare Ram Pandey v. State of Bihar and Ors.*, reported in : (2004)3SCC289 , wherein earlier decisions of the Supreme Court in this regard have been considered and relied upon. The relevant paragraph of the aforesaid decision is quoted hereunder:

'12. In *Sunil Fulchand Shah v. Union of India*, a Constitution Bench of this Court observed that a person may try to abscond and thereafter take a stand that period for which detention was directed is over and, therefore, order of detention is

infructuous. It was clearly held that the same plea even if raised, deserved to be rejected as without substance. In fact, in Sayed Taker case the fact position shows that 16 years had elapsed yet this Court rejected the plea that the order had become stale.'

35. It has been specifically urged on behalf of the petitioners that in the facts of the present case, respondent authorities cannot contend that the petitioner No. 1 was engaged in smuggling activities as the petitioner No. 1 never imported any goods into the country in absence of valid license and/ or without making payment of the proper duties.

36. The learned Counsel of the petitioners further submits that in absence of any advance license, petitioner had no occasion to bring any goods into the country without payment of duty and it has been suggested that smuggling merely means bringing goods into the country without payment of duty which has not been specifically alleged by the respondents in the present case at any stage.

37. It is true that the respondent authorities never alleged that the petitioners brought any goods into the country without payment of duty but Mr. Kapoor submits that the definition of 'smuggling' cannot be given such a narrow meaning. Section 2(39) of the Customs Act defines smuggling as hereunder:

'2(39). 'smuggling', in relation to any goods means any act or omission which will render such goods liable to confiscation under Section 11 or Section 113.'

38. In the present case, admittedly, advance licenses were obtained and duty-free goods have been brought into the country. According to the respondents herein, the petitioners did not fulfil its export obligations. The conditions of duty-free import subject to re-export of such goods are mandatory conditions and according to the respondents, namely, the Directorate of Revenue Intelligence, the petitioner No. 1 failed to fulfil such export obligations.

39. The learned Advocate of the respondents submits that the goods are liable to confiscation if the same are imported free from duty on condition of reexport and the importer does not observe that condition. Mr. Kapoor, in the aforesaid

circumstances, urged before this Court that the petitioner No. 1 herein is guilty of smuggling in view of the provisions of Section 2(39) and section 111(o) of the Customs Act.

40. Mr. Anindya Mitra, learned Senior Counsel of the petitioners specifically urged before this Court that the impugned detention order has no nexus with the objects of COFEPOSA and in my view, the same can only be ascertained when the detention order cannot be placed on record. It has also been submitted on behalf of the petitioners that adverse inference should be drawn against the respondent authorities for non-filing of the affidavit-in-opposition controverting the averments of the petitioners made in the writ petition.

41. The learned Senior Counsel of the respondents, however, submits that the respondents herein decided not to file affidavit-in-opposition in order to avoid disclosure of the grounds of detention before execution of the impugned detention order.

42. I find substance in the aforesaid contention of the respondents.

43. Mr. R. N. Das, learned Senior Counsel appearing on behalf of the respondent No. 1 also defended the actions of the respondent authorities regarding issuance of the impugned detention order to the petitioner No. 1 and specifically submits that the petitioners herein could not make out any case for interference with the impugned order of detention at the pre-execution stage by this Court.

44. The law relating to the detention order and the rights of the detenu to challenge the said detention order at the pre-execution stage i.e. before service of the detention order on the detenu have been considered by the Hon'ble Supreme Court in several other decisions, which are discussed hereinafter.

45. In the case of Union of India and Ors. v. Parasmal Rampuria, reported in : (1998)8SCC402 , the Supreme Court has observed as under:

'5. When the writ petition was filed, the respondent had not surrendered. Under these circumstances, the proper order which was required to be passed was to call upon the respondent first to surrender pursuant to the detention order and

then to have all his grievances examined on merits after he had an opportunity to study the grounds of detention and to make his representation against the said grounds as required by Article 22(5) of the [Constitution of India](#).... After surrendering it will be open to the respondent to amend his writ petition and to take all permissible legal grounds to challenge the detention order and these grounds will have to be considered by the High Court on their own merits after hearing the parties....'

46. In *Sayed Taker Bawamiya v. Joint Secretary to the Govt, of India and Ors.*, reported in : 2002 CriLJ259 , it was observed by the Hon'ble Supreme Court as follows:

'7... The petitioner had sought to contend that the order which was passed was vague, extraneous and on irrelevant grounds but there is no material for making such an averment for the simple reason that the order of detention and the grounds on which the said order is passed has not been placed on record inasmuch as the order has not yet been executed. The petitioner does not have a copy of the same and therefore it is not open to the petitioner to contend that the non-existent order was passed on vague, extraneous or on irrelevant grounds.'

47. The rights of a detenu to challenge the detention order even at the pre-execution stage have also been considered by the Hon'ble Supreme Court in the following decisions, which are very much applicable in the facts of the present case:

1) : (2004)3SCC289 [*Hare Ram Pandey v. State of Bihar and Ors.*]

2) : 2004 CriLJ1426 [*Union of India v. Amrit Lal Manchanda and Anr.*]

3) : 2004 CriLJ2480 [*Union of India and Ors. v. Vidya Bagaria*]

4) : 2000 CriLJ1444 [*Sunil Fulchand Shah v. Union of India and Ors.*]

48. No doubt this Court has power to interfere with the detention order at the pre-execution stage but the petitioners herein could not make out a strong prima facie case for interference by this Court even at the pre-execution stage within its very

limited scope as repeatedly held by the Hon'ble Supreme Court in various decisions mentioned hereinbefore. In the present case, since the order of detention issued to the petitioner No. 1 is not before the Court, it is difficult for this Court to examine the same and to find out whether it falls within the exception of rare cases as pointed out in *Alka Subhash Gadia* (supra).

49. For the reasons mentioned hereinabove, it cannot be said that the impugned order of detention issued to the petitioner No. 1 can be regarded as the rarest of rare case which warrants interference and/or intervention of this Court even at the pre-execution stage. In view of the factual positions narrated hereinabove, I am of the opinion that this is not a fit case where any interference is warranted before execution of the impugned order of detention.

50. For the aforementioned reasons, this writ petition stands dismissed.

51. The petitioner No. 1, however, will be at liberty to question the validity and/or legality of the impugned order of detention and the grounds on which the same has been passed by the concerned authority after execution of the same on appropriate grounds and in accordance with law notwithstanding any observation made herein.

52. There will be, however, no order as to costs.

53. All parties concerned are to act on a xerox signed copy of this judgment on the usual undertaking.