Shiv Ratan Makim S/o Nandlal Makim

Vs

Union of India and Others

Writ Petition (Criminal) No. 1122 of 1985

(CJI P. N. Bhagwati, R. S. Pathak JJ)

16.12.1985

JUDGMENT

BHAGWATI, C.J. -

1. This is a writ petition filed by the petitioner for a writ of habeas corpus praying for revocation of the order of detention dated April 11, 1985 passed by respondent 2, Joint Secretary to the Government of India, against the petitioner under Section 3 of the Conservation of Foreign Exchange and Prevention of Smuggling Activities Act, 1974 (hereinafter referred to as COFEPOSA Act). We heard the writ petition on September 18, 1985 and after hearing the arguments advanced on both sides, we passed an order on the same date dismissing the writ petition. We now proceed to give our reasons for making that order.

2. On the basis of information received by them, the Customs Officers at Panitanki Land Customs Station intercepted an auto-rickshaw bearing No. WGY 9854 coming from Nepal at about 8 am in the morning of November 20, 1984. There were four occupants in the auto-rickshaw, namely, the petitioner, Raj Kumar Gupta, Prem Prasad Bothari, and Akadeshi Bahadur. These four occupants as well as the driver of the auto-rickshaw were searched by the Customs Officers in the presence of independent witnesses and as a result of the search, no contraband goods were found in the possession of the other three occupants and the driver of the auto-rickshaw but from the pocket of the trousers worn by the petitioner, two pieces of foreign marked gold in the shape of round tablets weighing 373.800 gms. and valued at Rs 74,760 were recovered and they were seized under the Customs Act. The petitioner was immediately arrested and on interrogation, he filed a written statement on the same day stating that he had been unemployed for a long time and that he was introduced in the business of purchase and sale of foreign marked gold by one Prakash Pincha and that on November 16, 1984, he left Kathiar by bus and arrived in Kathmandu at 6 am on November 18, 1984 and stayed at Kanji Lodge in Kathmandu and as per prior arrangement, he contracted one Dena Lal Aggarwal on Telephone No. 344889 and Dena Lal Aggarwal thereupon came to Kanji Lodge along with the requisite quantity of gold and he took delivery of gold from Dena Lal Aggarwal and paid him Rs 70,400 in Indian currency and thereafter he left Kathmandu at 1800 hrs. on November 19, 1984 reaching Kakarbatha opposite Panitanki Land Customs Station at 7.30 am on November 20, 1984 ad boarded auto-rickshaw bearing No. WGY 9854 which later on picked up the other passengers and ultimately the auto-rickshaw was intercepted and he was searched resulting in the seizure of two pieces of foreign marked gold which were in the pocket of his trousers. The petitioner was produced before the Sub-Divisional Judicial Magistrate, Siliguri on November 21, 1984 and on an application made by him, he was released on bail by the Sub-Divisional Judicial Magistrate on December 5, 1984. The second respondent who is the Joint Secretary to the Government of India thereafter passed an order dated April 11, 1985 under Section 3 of

COFEPOSA Act directing that the petitioner be detained and kept in custody in the Central Jail, Patna. The order of detention recited that it was passed with a view of preventing the petitioner from smuggling goods. The grounds on which the order of detention was based were supplied to the petitioner immediately on his arrest under the order of detention. The petitioner made a representation dated May 17, 1985 against the order of detention but the representation was rejected by the Central Government on May 23, 1985. The case of the petitioner was placed before the Advisory Board which gave the opinion that there was sufficient cause for the detention of the petitioner and on receipt of this opinion of the Advisory Board, the Central Government by an order dated June 6, 1985 confirmed the order of detention and directed that the petitioner be detained for a period of one year from the date of his detention, namely, April 23, 1985. The petitioner thereupon preferred the present writ petition challenging the validity of the order of detention and seeking a direction that he may be released from detention.

3. Though several grounds were taken in the writ petition only three were seriously pressed by the learned counsel appearing on behalf of the petitioner. The first ground was that the order of detention was based on the solitary incident in which two pieces of foreign marked gold were recovered from the pocket of the trousers of the petitioner on November 20, 1984 and apart from this incident there were no other incidents showing that he was habitually smuggling gold. The second ground was that considerable time had elapsed between the date when he was found to be carrying two pieces of foreign marked gold and the date of the order of detention and this long lapse of time showed that the order of detention was vitiated by mala fides. And the last ground was that the order of detention was made with a view to circumventing or bypassing the criminal prosecution instituted against the petitioner and the detaining authority had not applied its mind to the vital aspect that the power of detention cannot be used to subvert, supplant or substitute the punitive law. We do not think any of these three grounds can be sustained.

4. So far the first ground is concerned, it is obvious that having regard to the nature of the activity of smuggling, an inference could legitimately be drawn even from a single incident of smuggling that the petitioner was indulging in smuggling of gold. Moreover, the written statement given by the petitioner clearly indicated that the petitioner was engaged in the business of purchase and sale of foreign marked gold and that this incident in which he was caught was not a solitary incident. The facts stated by the petitioner in his written statement could legitimately give rise to the inference that the petitioner was a member of a smuggling syndicate and merely because only one incident of smuggling by the petitioner came to light, it did not mean that this was the first and only occasion on which the petitioner tried to smuggle gold. There can be no doubt that having regard to the nature of the activity and the circumstances in which the petitioner was caught smuggling gold and the facts set out by him in his written statement, the second respondent was justified in reaching the satisfaction that the petitioner was engaged in smuggling gold and that with a view to preventing him from smuggling gold, it was necessary to detain him.

5. Turning to the second ground of challenge, we do not think that the lapse of time between the date when two pieces of foreign marked gold were found on the person of the petitioner and the date of the order of detention was so unduly long or that the explanation for such lapse of time offered by the respondents was so unsatisfactory that we should draw an inference of mala fides on the part of the detaining authority in making the order of detention. The delay in making the order of detention has, in our opinion, been satisfactorily explained by the time-chart set out as Annexure RI to the counter-affidavit filed by Shri A.K. Agnihotri on behalf of the respondents. It is no doubt true that where an unreasonably long period has elapsed between the date of the incident and the date of the order of detention, an inference may legitimately be drawn that there is no nexus between the

incident and the order of detention and the order of detention may be liable to be struck down as invalid. But there can be no hard and fast rule as to what is the length of time which should be regarded sufficient to snap the nexus between the incident and the order of detention. We are of the view that here the lapse of time between the date of the incident and the date of the order of detention has been sufficiently explained by the detaining authority and hence we are not prepared to draw the inference of mala fides merely because the order of detention happened to be made about five months after the petitioner was found carrying two pieces of foreign marked gold.

6. The last ground urged on behalf of the petitioner is also equally without substance. The contention of the petitioner was that criminal prosecution cannot be circumvented or short-circuited by ready resort to preventive detention and the power of detention cannot be used to subvert, supplant or substitute the punitive law of the land. The petitioner urged that no material has been disclosed by the respondents to establish the existence of any exceptional reasons which would justify recourse to preventive detention in the present case such as witnesses being afraid to depose against the detenu in court or other genuine difficulties in bringing the culprits to book in a criminal court under the ordinary law of the land and in the absence of such reasons before the detaining authority, it was not competent to the detaining authority to make the order of detention bypassing the criminal prosecution. This argument completely overlooks the fact that the object of making an order of detention is preventive while the object of a criminal prosecution is punitive. Even if a criminal prosecution fails and an order of detention is then made, it would not invalidate the order of detention, because, as pointed out by this Court in Subrati v. State of W.B. ((1973) 3 SCC 250 : 1973 SCC (Cri) 245) "the purpose of preventive detention being different from conviction and punishment and subjective satisfaction being necessary in the former while proof beyond reasonable doubt being necessary in the latter", the order of detention would not be bad merely because the criminal prosecution has failed. It was pointed out by this Court in that case that "the Act creates in the authorities concerned a new jurisdiction to make orders for preventive detention on their subjective satisfaction on grounds of suspicion of commission in future of acts prejudicial to the community in general. This jurisdiction is different from that of judicial trial in courts for offences and of judicial orders for prevention of offences. Even unsuccessful judicial trial or proceeding would, therefore, not operate as a bar to a detention order, or render it mala fide". If the failure of the criminal prosecution can be no bar to the making of an order of detention, a fortiori the mere fact that a criminal prosecution can be instituted cannot operate as a bar against the making of an order of detention. If an order of detention is made only in order to bypass a criminal prosecution which may be irksome because of the inconvenience of proving guilt in a court of law, it would certainly be an abuse of the power of preventive detention and the order of detention would be bad. But if the object of making the order of detention is to prevent the commission in future of activities injurious to the community, it would be a perfectly legitimate exercise of power to make the order of detention. The court would have to consider all the facts and circumstances of the case in order to determine on which side of the line the order of detention falls. Here the petitioner was caught in the act of smuggling gold and the circumstances in which the gold was being smuggled as also the facts set out in the written statement of the petitioner clearly indicate that the petitioner was engaged in the activity of smuggling gold and if that be so, it is not possible to say that the order of detention was passed by the second respondent with a view to subverting, supplanting or substituting the criminal law of the land. The order of detention was passed plainly and indubitably with a view to preventing the petitioner from continuing the activity of smuggling and it was therefore a perfectly valid order of detention.

7. These were the reasons for which we sustained the order of detention and dismissed the writ petition.

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